In the Supreme Court of the United States

NO. 49

OCTOBER TERM, 1928

PACIFIC STEAMSHIP COMPANY,

Plaintiff in Error,

vs.

CARL G. PETERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of the Respondent

HARRY ELLSWORTH FOSTER,
MELVILLE MONTGOMERY,
Counsel for Respondent.

1710 L. C. Smith Building,
Seattle, Washington.

INDEX

	PAGE
Opinion of the Supreme Court of Washington (R. 34)	1
The Question Presented	1
Act of Congress	1
Statement of the Case	3
Summary of Argument	3
Origin of the Act	5
General Considerations	6
Construction of the Statute	8
Wages, Maintenance and Cure Contractual	12
Election of Remedies	14
Decision of the Supreme Court of Washington	19
Authorities Relied Upon by the Petitioner	20
Conclusion	22

CITATIONS

Cases:	PAGE
Aldridge vs. Williams, 3 How. 24	11
The Balsa, 10 Fed. 2nd 408	7
Baltimore Steamship Co. vs. Phillips, 274 U. S. 316	20
Bate Refrigerating Co. vs. Sulzberger, 157 U. S. 1, 37	9
Bierce vs. Hutchins, 205 U. S. 340	16
Blake vs. National Banks, 23 Wal. 307	9
Bloomer vs. McQuewan, 14 How. 539	9
The Bowker, 241 Fed. 831	7
Brady vs. Daley, 175 U. S. 148	16
Bramwell vs. United States Fidelity & Guaranty Co., 269 U. S. 483, 489	21

Carlisle Packing Co. vs. Sandanger, 259 U. S. 255 19
Chelentis vs. Luckenbach Steamship Co., 247 U. S. 372 5
Church of the Holy Trinity vs. United States, 143 U. S. 457 10
Cohens vs. Virginia, 6 Wheat. 264 20
Cresci vs. Standard Fisheries, 7 Fed. 2nd 378, 1925 A. M. C. 1026 ..... 12 and 15
Engel vs. Davenport, 271 U. S. 33 20
Fleischman Co. vs. United States, 270 U. S. 349 10
Flyn vs. The Panama Railway, 201 N. Y. S. 56 ..... 12, 15 and 17
The A. Heaton, 43 Fed. 592 ..... 12, 13, 14 and 15
Heydon's Case, 3 Rep. 7 b. 10
International Stevedoring Co. vs. Haverty, 272 U. S. 50 8
Knowlton vs. Moore, 178 U. S. 41 9
Lau Ow Bew vs. United States, 144 U. S. 47 10
The Montezuma, 19 Fed. 2nd 355 13
Morris vs. United States, 3 Fed. 2nd 589 7
The Hanna Nielson, 273 Fed. 171 ..... 12 and 15
Hawaii vs. Mankichi, 190 U. S. 197 10
Oates vs. National Bank, 100 U. S. 239, 244 9
Olson vs. Whitney, 109 Fed. 80 ..... 12 and 15
The Osceola, 189 U. S. 158 ..... 5, 12 and 13
Ozawa vs. United States, 260 U. S. 178 10
Panama Railroad vs. Johnson, 264 U. S. 375 20
Panama Railroad vs. Vasquez, 271 U. S. 557 20
Phillips vs. The Baltimore Steamship Co., 274 U. S. 316 16
Plamals vs. The Pinar Del Rio, 72 L. Ed. 540 ..... 17 and 20
Platt vs. United Pacific Railroad, 99 U. S. 48, 64 11
Preston vs. Browder, 1 Wheaton, 120 11
John A. Roebling & Sons vs. Erickson, 261 Fed. 930 ..... 12, 14 and 15
The Rolph, 299 Fed. 52, 1924, A. M. C. 942 ..... 12, 14 and 15
The Santa Barbara, 263 Fed. 369 7

PAGE

Smith vs. Townsend, 148 U. S. 490, 494 10
The Talayha, 26 Fed. 2nd 601 16
Taylor vs. Voss, 271 U. S. 176 22
The Troy, 121 Fed. 901 ..... 12 and 15
United States vs. Kirby, 7 Wal. 482 9
United States vs. United Pacific Railroad, 91 U. S. 72, 79 11
Washington vs. Dawson, 264 U. S. 219 21
The West Jester, 281 Fed. 877 ..... 12 and 15
Weaver vs. Palmer Bros. Co. 270 U. S. 402 22
Wilkinson vs. Leland, 2 Pet. 627 9
Wilson vs. Rousseau, 4 How. 646 9
Zimmerman vs. Harding, 227 U. S. 489 16

Statutes: PAGE

Act of June 5, 1920, Sec. 33, Chapt. 250, 41 Stat. at L. 988, U. S. Code, Title 46, Sec. 688 ..... 1 and 2

Sec. 20, of LaFollette Act, 38 Stat. at L. 1164, 1185 5

Textbooks, etc.:

35 Cyc. p. 1200 12
Sedgwick Const. and Stat. Const. 9

In the Supreme Court
OF THE
United States

NO. 49
OCTOBER TERM, 1928

PACIFIC STEAMSHIP COMPANY,
Petitioner,

vs.

CARL G. PETERSON,
Respondent.

Brief of the Respondent

OPINION

The opinion of the Supreme Court of the State of Washington (R. 34) is reported in 145 Wash. 460.

THE QUESTION PRESENTED

This case involves a construction of the Act of June 5, 1920, Sec. 33, Chap. 250; 41 Stat. at L. 988, U. S. Code, Title 46, Sec. 688, which is as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Supreme Court of the State of Washington held that the voluntary payment by the petitioner of the wages to the end of the voyage, amounting to $41.10, and furnishing of free medical, surgical and hospital service by the United States Public Health Service was not a bar to the maintenance of this action for compensatory damages. The petitioner urges and the sole question presented is: Does the payment of wages to the end of the voyage and the furnishing of free medical, surgical and hospital service by the United States Public Health Service bar an action for compensatory damages under the Merchant Marine Act?

STATEMENT OF THE CASE

No portion of the evidence is brought here and the question is attempted to be raised solely by the pleadings.

The respondent was injured at sea while serving as boatswain upon petitioner's Steamship Admiral Dewey. He was treated in the Marine Hospital at San Francisco by the United States Public Health Service and while confined in the hospital was paid his wages due under the Articles to the end of the voyage, amounting to $41.10. (R. 9-13.)

Thereafter he recovered a judgment for $12,500.00 in the Superior Court of the State of Washington for King County, which was affirmed by the Supreme Court of the State of Washington and the case brought here by Writ of Certiorari.

SUMMARY OF ARGUMENT

If the words in question "at his election" have any other meaning than that ascribed to them by the Supreme Court of the State of Washington in its opinion, that is, a choice between a suit in admiralty and a trial by the Court, or a trial by jury according to the course of the common law if an action is instituted in a law court, then the words refer to a choice between the inconsistent actions for compensatory

damages on the ground of unseaworthiness in rem or in personam and for compensatory damages on the ground of negligence, and not between an action for damages on any ground and the consistent and cumulative remedy of wages, maintenance and cure, which is entirely a separate and distinct cause of action.

1. The origin of the act shows that the mischief or evil to be cured was the inability of a seaman to recover compensatory damages for personal injuries except when caused by unseaworthiness.

2. The right to wages, maintenance and cure is a cause of action separate and distinct from a cause of action for compensatory damages and has always been cumulative and co-extensive and not inconsistent with an action for compensatory damages.

3. The construction urged by petitioner is so absurd in its consequences as to call for the application of the rule that the Court will adopt in cases where more than one view is open, the reasonable construction of the act rather than the unreasonable one.

4. The rule of election of remedies only applies to inconsistent ones and not to those entirely consistent and cumulative.

5. That the question presented was not decided in any of the authorities cited by the petitioner.

ARGUMENT

ORIGIN OF THE ACT.

In 1902 the Supreme Court of the United States in *The Osceola*, 189 U. S. 158 enumerated the rules applicable in cases of injury to seamen in four distinct propositions, significant amongst which was that a seaman could not recover compensatory damages for personal injuries unless caused by unseaworthiness of the ship.

Congress attempted, by Section 20 of the original Merchant Marine Act of 1915, to extend to seamen greater rights in cases of personal injury, by the following provision:

> "That in any suit to recover damages for any injuries sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

In 1918 in *Chelentis vs. Luckenbach Steamship Co.*, 247 U. S. 372, it was held that the Act did not substitute the common law measure of liability in such cases.

Subsequently, on June 5, 1920, Congress by Section 33 of the Merchant Marine Act extended to seamen, in cases of personal injury of death, the Federal Employers' Liability Act relating to railroads.

GENERAL CONSIDERATIONS

There are three possible constructions of the words "at his election."

First. That urged by the petitioner—that the the statute refers to a choice between wages, maintenace and cure and compensatory damages.

Second. The one adopted by the Supreme Court of the State of Washington—that the Act referred to a choice of remedies, that is, a trial by the Court in admiralty or a trial by jury according to the course of the common law.

Third. That the election referred to by the plain terms of the statute is an election between an action for damages on the ground of unseaworthiness, and an action for damages on the ground of negligence, and not an election between the contract action of wages, maintenance and cure and an action for damages in tort.

If the contention urged by the petitioner is sustained the right of seamen would be seriously abridged in many particulars.

The United States has established the United States Public Health Service, which maintains marine hospitals in many ports. That service provides, without cost to either the ship, its owners or the seamen,

hospital, medical and surgical attention in cases of sickness or injury to the seaman. It has been decided that if a seaman, in case of sickness or injury, rejects the service of the marine hospital he is deprived of his right to recover his hospital and medical expenses.

The Santa Barbara, 263 Fed. 369;
The Bowker, 241 Fed. 831;
The Balsa, 10 Fed. 2nd. 408;
Morris vs. United States, 3 Fed. 2nd. 589.

If the petitioner's contention is sustained a seaman would be deprived of his right to compensatory damages in case he accepted the free service of the marine hospital. If he rejected the surgical and hospital facilities so afforded, he is precluded from recovering the cost of private physcians and surgeons and private hospital expenses.

In cases then of serious injury the use of the United States Public Health Service and the facilities available would be seriously impaired, if not, in fact, totally destroyed, because a seaman would forfeit whatever right he might have to damages in case he accepted the free medical, surgical and hospital facilities so afforded.

If, perchance, the injuries were caused by the unseaworthiness of the ship the seaman might recover

damages after accepting the marine hospital service, but if the same injuries were caused aboard the same ship by the negligence of the ship's crew or the owners, he could not recover compensatory damages.

If a seaman were injured at the beginning of a long voyage and allowed the ship's doctor to treat his injury, or if he accepted the maintenance of the ship on the voyage, he would have made his election, barring his right to recover damages, in case the petitioner's view is correct. Does it not follow that if a seaman, under such circumstances, desires to preserve his right of action for the injury that it is necessary for him to immediately leave the ship? The results which must necessarily follow are so absurd and unreasonable that the construction urged by the petitioner should not be attributed to Congress unless there is no reasonable construction to be placed upon the terms employed.

CONSTRUCTION OF THE STATUTE

That this act is to be liberally construed is manifested by all of the decisions of this Court construing the act, the most illustrative of which is the recent and widely discussed case of *International Stevedoring Co. vs. Haverty*, 272 U. S. 50.

It is one of the cardinal rules of statutory construction that where two constructions of a statute

are open, one of which is absurd and will produce inequality and injustice and the other reasonable, the Court will adopt the reasonable one.

This was expressed by the Court in *Oates vs. National Bank*, 100 U. S. 239, 244 in the following words:

> "The duty of the Court, being satisfied of the intention of the Legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction, (*Wilkinson vs. Leland*, 2 Pet. 627, *Sedgwick Const. and Stat. Constr.* 196) and we should discard any construction that would lead to absurd consequenses. *United States vs. Kirby*, 7 Wal. 482. We ought, rather, adopting the language of Lord Hale, to be 'curious and subtle to invent reasons and means' to carry out the clear intent of the law-making power when thus expresed.

And the Court in *Knowlton vs. Moore*, 178 U. S. 41, on page 77 of the opinion said:

> "We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. *Bate Refrigerating Co., vs. Sulzberger*, 157 U. S. 1, 37, *Wilson vs. Rousau*, 4 How. 646, 680, *Bloomer vs. McQuewan*, 14 How. 539, 553, *Blake vs. National Banks*, 23 Wal. 307, 320; *United States* vs. *Kirby*, 7 Wal. 482, 486."

The Court in *Fleischman Co. vs. United States*, 270 U. S. 349, on page 360, said:

> "The strict letter of an Act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress, *Church of the Holy Trinity, vs. United States*, 143 U. S. 457, 459; *Ozawa vs. United States*, 260 U. S. 178, 194, and unjust or absurd consequences are, if possible, to be avoided. *Lau Ow Bew vs. United States*, 144 U. S. 47, 59; *Hawaii vs. Mankichi*, 190 U. S. 197, 213."

It has uniformly been recognized by Courts construing statutes upon which different constructions are placed to have regard for the evil or mischief which brought forth the statute.

In *Smith vs. Townsend*, 148 U. S. 490, 494, the Court expressed this rule in the following language:

> "It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. Thus in *Heydon's Case*, 3 Rep. 7b, it is stated that it was resolved by the Barons of the Exchequer as follows:
>
> 'For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered:
>
> First: What was the Common Law before the making of the Act.

Second: What was the mischief and defect for which the Common Law did not provide.

Third: What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth.

Fourth: The true reason of the remedy.'

And by this court in *United States vs. United Pacific Railroad,* 91 U. S. 72, 79, it was said that 'Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it. *Aldridge vs. Williams,* 3 How. 24, *Preston vs. Browder,* 1 Wheaton, 120' and in *Platt vs. United Pacific Railroad* 99 U. S. 48, 64, 'that in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances'."

To adopt then the contention of the petitioner with the consequent absurd and unjust consequences would be wrong in light of the evident evil which brought forth the statute—that is, the impossibility of a seaman to recover damages for the effects of his injury when the liberal and reasonable view can be adopted that his contractual rights to wages and a free cure in the marine hospital is not an election barring his ex delicto action for damages for the effects of his injury.

WAGES. MAINTENANCE AND CURE

CONTRACTUAL

By decisions of unquestioned soundness and of long standing it has been determined that the right of seamen to recover wages, maintenance and cure is contractual in its nature and exists under any and all circumstances except when the injuries are occasioned by the seaman's own wilful misconduct.

The Osceola, 189 U. S. 158;

Cresci vs. Standard Fisheries, 7 Fed. 2nd. 378, 1925, A. M. C. 1026;

John A. Roebling & Sons vs. Erickson, 261 Fed. 986;

The Rolph, 299 Fed. 52, 1924, A. M. C. 942;

The A. Heaton, 43 Fed. 592;

Flyn vs. The Panama Railway, 201 N. Y. S. 56;

The Troy, 121 Fed. 901;

The West Jester, 281 Fed. 877;

Olson vs. Whitney, 109 Fed. 80;

The Hanna Nielson, 273 Fed. 171;

It was well expressed by District Judge Kerrigan in *Cresci vs. Standard Fisheries*, 7 Fed 2nd. 378:

> "On the other hand, it is quite clear than an action for miantenance and cure is contractual in its nature. As is said in 35 Cyc., at p. 1200: 'Under the maritime law, it is the duty of the vessel to care for a seaman taken sick on the voyage and to bear the expense of his medical

treatment, * * even though the cause of his injury can be attributed to no one'."

And in the *Montezuma*, 19 Fed. 2nd, 355, the right was aptly defined:

> 'The relation of a seaman to his vessel creates a personal indenture, establishing rights for maintenance and cure in case of personal injury. It results in much liberality of remedy in order that he may not be defeated of such humanitarian purposes."

In *The A. Heaton*, 43 Fed. 592 the Court said:

> "A seaman, taken sick, or injured, or disabled in the service of the ship, has the right to receive his wages to the end of the voyage, and to be cured at the ship's expense. That right, indeed, grounded solely upon the benefit which the ship derives from his service, and having no regard to the question whether his injury has been caused by the fault of others or by mere accident, does not extend to compensation or allowance for the effects of the injury; but is in the nature of an additional privilege and not a substitute for, or a restriction of other rights and remedies. It does not, therefore, displace or affect the right of the seaman to recover against the master or owners for injuries by their unlawful or negligent acts."

It was decided in *The Osceola*, 189 U. S. 158, that the seaman was entitled to compensatory damages only when his injury was caused by the unseaworthiness of the ship, in which case he could recover full compensatory damages, or as it has been sometimes designated an indemnity.

These rights were absolutely independent and existed simultaneously and concurrently. The two were completely separate and distinct. This is well illustrated by the Court in *John A. Roebling & Sons vs. Erickson*, 261 Fed. 986:

> "The plaintiff should not have been required to elect whether to stand on his claim for indemnity, or upon his right to wages and expense of cure and maintenance to the end of the voyage. To the latter the seaman is entitled under any and all circumstances, except his own willful misconduct.'

And in the case of *Rolph*, 299 Fed. 52:

> "Nor should Kohilas be precluded from recovering because of the fact that in another proceeding for wages and maintenance he recovered. His right to wages, maintenance and expense of cure existed under any and all circumstances unless there was willful misconduct; but his right to recover an indemnity is a separate matter. The decree for wages cannot be imposed against his demand for damages. *The A. Heaton*, 43 Fed. 592."

ELECTION OF REMEDIES

Section 33 of the Merchant Marine Act gives a right of action ex delicto. The action given was in lieu of and in addition to the right of the seaman under the old rules to recover an indemnity where he was entitled to it. The election afforded then is, by both reason and authority, a choice between an action

based upon unseaworthiness under the old rules and an action for compensatory damages based upon negligence under the terms and provisions of the statute.

The words of the statute:

> "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury and in such action, etc."

refer to actions for damages for the injury and not between an action for damages and for his contractural rights to wages, maintenance and cure.

It is established by the following cases:

Cresci vs. Standard Fisheries, 7 Fed. 2nd. 378, 1925 A. M. C. 1026;

John A. Roebling & Sons vs. Erickson. 261 Fed. 986.

The Rolph, 299 Fed. 52, 1924, A. M. C, 942;

The A. Heaton, 43 Fed. 592;

Flyn vs. The Panama Railway, 201 N. Y. S. 56;

The Troy, 121 Fed. 901;

The West Jester, 281 Fed. 877;

Olson vs. Whitney, 109 Fed. 80;

The Hanna Nielson, 273 Fed. 171.

that the action for wages, maintenance and cure is contractual in its nature and not in any wise intended as compensation for the injuries sustained.

The two actions are not in any wise inconsistent, but the recovery of damages on the ground of unseaworthness would be inconsistent and a bar to a subsequent action for damages based upon negligence. As the Court determined in *Phillips vs. The Baltimore Steamship Co.*, 274 U. S. 316, the cause of action, whether based upon unseaworthiness or negligence, is one and the same.

In applying the rule of election of remedies the courts have announced that the remedies must be inconsistent. On the other hand if the remedies are consistent a pursuit of one, or a recovery of one, will not bar a recovery of the other. The remedial rights adopted must be irreconcilable.

Zimmerman vs. Harding, 227 U. S. 489.
Bierce vs. Hutchins, 205 U. S. 340.
Brady vs. Daley, 175 U. S. 148.

The right of the seaman to wages, maintenance and cure and compensatory damages under the Jones Act were in *The Talayha*, 26 Fed. 2nd, 601, held by the Circuit Court of Appeals for the Ninth Circuit not to be inconsistent. The Court said:

> "There is no inconsistency between the right to recover for maintenance and cure under the general admiralty law and the additional right conferred by the 1920 amendment. The remedies are not of such a nature that the adoption of the

one is a repudiation or negation of the other. The appellee simply had two co-existing remedies, with the right and privilege of choosing either mode of redress, and when he made his choice his act in so doing cannot be construed as a final repudiation of every other right. In other words, the remedies are not inconsistent, in the sense that the adoption of the one precludes a resort to the other."

It is, furthermore, fundamental that the election must refer to remedies for the same cause of action. Applying those rules to the instant case we find that the right to wages, maintenance and cure is in no wise intended as compensation for the effects of the injury received; that it is a separate and distinct cause of action, contractural in its nature, arising out of the personal indenture created by the shipping Articles between the seaman and the ship, and is based entirely upon the benefit which the ship receives from his services.

The opinion of the Court in *Plamals vs. Pinar Del Rio*, 72 L. Ed. 540, illustrates the distinction between the actions under the old rules and those created by the statute. If the action is for compensatory damages for unseaworthiness then a lien exists against the ship which may be enforced by a libel in rem. But, on the other hand, no lien is created by Section 33 of the Merchant Marine Act and consequently the rights created may be enforced only by appropriate

proceedings in personam, either in admiralty or in a common law Court.

It would be unfair and unjust to allow a seaman, in case of injury, to recover compensatory damages either in personam or in rem on the ground of unseaworthiness and thereafter to recover compensatory damages on the ground of negligence.

It was to this that Congress referred by the words "at his election" because, as has previously been observed, prior to the passage of the act the right to damages for the effects of the injury and the right to wages, maintenance and cure were separate, distinct, cumulative and consistent.

The express purpose of the Act being to provide for the protection and maintenance of the American Merchant Marine the words employed do not convey an intention on the part of Congress to restrict seamen's rights, but the evident spirit and purpose of the Act were to afford seamen the same measure of relief afforded railway employees in case of personal injury.

It was aptly expressed by the Supreme Court in New York in *Flynn vs. Panama Railroad*, 201 N. Y. Sup. 56:

> "It does not appear that the Act of Congress of June 5, 1920, was intended to restrict in any

way seamen's rights as they previously existed, and it was settled law before the adoption of the Act of Congress, supra, that the seaman was not required to elect between a claim for indemnity and a claim for maintenance and cure, but might in one action demand both."

DECISION OF THE SUPREME COURT

The conclusion and the result of the decision of the Supreme Court of the State of Washington herein are correct, the Court being of the opinion, and so holding, that the seaman had not elected his remedy by accepting so positive a matter of course duty on the part of the ship owner toward him as wages, maintenance and cure. If the reasoning by which the Court arrived at that conclusion is faulty it is "an unavoidable incident in the search by Courts of last resort for the true rule."

Under such circumstances this Court announced in *Carlisle Packing Co., vs. Sandanger,* 259 U. S. 255, the rule to be as follows:

> "Here the trial court did not instruct the jury in consonance with these rules and by failing to do so fell into error.
>
> But mere error without more is not enough to upset the judgment if the record discloses that no injury would have resulted therefrom."

19

AUTHORITIES RELIED UPON BY THE PETITIONER

The cases in this Court under the Jones Act touching this question in any wise are:

Plamals vs. The Pinar Del Rio, 72 L. Ed. 540.

Baltimore Steamship Co. vs. Phillips, 274 U. S. 316.

Panama Railroad vs. Vasquez, 271 U. S. 557.

Engel vs. Davenport, 271 U. S. 33.

Panama Railroad vs. Johnson, 264 U. S. 375.

The petitioner seizes upon certain language of the Court employed in those cases in reaching the conclusions in the particular cases as conclusive of the question herein presented.

The question here has not been before the Court before, nor has it been decided. In reaching the conclusions in those cases language was used in expressing the reasoning of the Court which was not involved by the facts.

The Court has many times observed that the language used in an opinion is to be taken in connection with the facts under consideration. Mr. Chief Justice Marshall pronounced the rule in *Cohens vs. Virginia*, 6 Wheaton, 264, 399, in the following manner:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be tak-

> en in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Mr. Justice Brandeis in his dissenting opinion in *Washington vs. Dawson & Co.*, 264 U. S. 219, 236, aptly said:

> "It would require merely that we should limit the application of the rule therein announced, and that we should declare our disapproval of certain expressions used in the opinions. Such limitation of principles previously announced, and such express disapproval of dicta, are often necessary. It is an unavoidable incident of the search by Courts of last resort for the true rule. The process of inclusion and exclusion so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law."

It was said in *Bramwell vs. United States Fidelity & Guaranty Co.*, 269 U. S. 483, 489:

> "It is a rule of universal application that general expressions used in a Court's opinion are to

be taken in connection with the case under consideration."

Weaver vs. Palmer Bros. Co., 270 U. S. 402.
Taylor vs. Voss, 271 U. S. 176.

CONCLUSION

We, therefore, respectfully submit that under the well established rules of construction this Act is to be liberally construed with the view to effect the object intended of allowing seamen to recover damages for personal injuries and not to restrict the rights of seamen. That the right of the seaman to wages, maintenance and cure is a cause of action sounding in contract, separate and distinct from one for damages and in no wise inconsistent with it. That under all of the authorities an election of remedies takes place only where they are inconsistent and irreconcilable. That the intent of Congress was to afford seamen a choice between an action for damages on the ground of unseaworthiness which might be enforced by appropriate proceedings in either rem or personam, and a personal action against the owners for damages, based upon negligence, and not to substitute or restrict the right of seamen, in cases of injury, to wages, maintenance and cure, where he accepted the service of the marine hospital.

We, therefore, respectfully submit that the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfuly submitted,

HARRY ELLSWORTH FOSTER

and

MELVILLE MONHEIMER,

Counsel for Respondent.